No. 83-51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BONDED ELEVATOR, INC. and
FRANK CORUM, Executor of the
Estate of Deceased Otto Corum,
Petitioners,

v.

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals misapplied or misinterpreted Kentucky State law in affirming the District Court's denial of Petitioners' motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure.

2. Whether the Court of Appeals abused its discretion in refusing to certify a question of Kentucky State law to the Supreme Court of Kentucky.

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STATEMENT OF THE CASE

Petitioners' Statement of the Case includes argumentative and incorrect conclusions regarding the opinions below and omits a number of facts which warrant consideration by the Court in order to place the Petition in its proper perspective. A brief statement of the case will help to clarify the issues presented for review.

First American's Loan And Security

This case arises out of a financing arrangement between Respondent, First American National Bank ("First American") and the Petitioners, Bonded Elevator, Inc. ("Bonded") and Otto Corum ("Corum"). The arrangement involved a $2,500,000 working capital loan by First American to Bonded which was secured by grain stored in one of Bonded's grain elevators and guaranteed by Corum, Bonded's president and principal shareholder. First American perfected its security interest in the grain both by filing UCC financing statements in the appropriate places and taking possession of non-negotiable warehouse receipts issued by a field warehouseman, SLT Warehouse Company ("SLT"), under a field warehousing arrangement with Bonded. Under this arrangement, SLT established a field warehouse at Bonded's elevator at Calvert City, Kentucky. SLT would receive grain at the elevator and issue a non-negotiable warehouse receipt evidencing its delivery. The receipts, which recited that the grain would be held for the account of and be delivered upon the instructions of First American, were used by Bonded to obtain advances on the loan from First American.

First American's Judgments Against Bonded and Corum

This action was instituted after First American was advised that a large quantity of grain stored at the Calvert City elevator was discovered missing. First American made demand for payment on the note and guaranty and made a demand upon SLT to deliver the grain represented by the non-negotiable receipts. When no action was forthcoming, First American filed suit on December 13, 1978 against Bonded, Corum and SLT in the United States District Court for the Western District of Kentucky. Jurisdiction was based upon diversity of citizenship.

The suits against Bonded and Corum were premised upon the note and guaranty respectively. First American's action against

SLT, on the other hand, was for breach of contract based upon the warehouse receipts and for alleged negligent operation of the field warehouse. SLT and the Petitioners subsequently cross-claimed against each other regarding responsibility for the lost grain. These cross-claims are pending before the District Court and are set for trial on August 29, 1983.

On February 9, 1980, the District Court ruled on First American's motions for summary judgment against SLT, Bonded and Corum. The Court entered partial summary judgments against Bonded and Corum on the note and guaranty but denied the motion for summary judgment against SLT. Final judgments in favor of First American subsequently were entered by the District Court against Bonded on May 21, 1981 in the sum of $2,893,049.64 plus interest and against Corum on May 4, 1980 in the sum of $2,569,265.37 plus interest. These judgments were affirmed by the Court of Appeals on March 25, 1982. No petition for certiorari was filed with respect to these judgments.

The Loan Receipts

Following the entry of summary judgments against Bonded and Corum, First American renewed its motion for summary judgment against SLT. While that motion was pending, SLT entered into a Loan Receipt and Agreement with its insurance carriers by which the carriers loaned SLT $2,350,000 without interest, repayable to the extent of any recovery SLT may obtain from Bonded, Corum or any other person arising from the note, guaranty or the disappearance of the grain. Thereafter, SLT entered into a Loan Receipt and Agreement with First American by which, in consideration for First American's dismissal of SLT with prejudice, SLT loaned $2,350,000 to First American, repayable to the extent of any net monetary recovery which First American may obtain from Bonded, Corum, or any other person arising from the disappearance of the grain. In the agreement, First American expressly reserved its claim against

Bonded, any officers, directors, shareholders, employees and agents of Bonded, Corum, or any of Bonded or Corum's affiliates, or against any other person. Thereafter on December 30, 1980 First American dismissed its suit against SLT with prejudice. The Order of dismissal recited that "all other matters are reserved."

Bonded and Corum's Rule 60(b) Motion

While the summary judgments against Bonded and Corum were on appeal to the United States Court of Appeals for the Sixth Circuit, Bonded and Corum filed a motion in the District Court for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. The motion was based solely upon the loan receipt transaction. Bonded and Corum claimed that the execution of the loan receipt somehow constituted a payment, satisfaction, or release of their judgment obligations to First American.

After extensive briefing of the issue, a hearing, and additional discovery, the District Court denied Bonded and Corum's motion on February 11, 1982. Contrary to Petitioners' contention, the District Court's ruling was not based solely upon the "continued pendency of Corum and Bonded's cross-claim against SLT" (p. 4). That was only one of several reasons. Thus the District Court said (Appendix p. 5a):

> A motion requesting relief under Rule 60(b) is addressed to the discretion of the Court . . . and here it must be noted that both Bonded and Corum have been adjudged to be liable to the plaintiff under the promissory note and guaranty; moreover, there is no indication that the Bank will make a double recovery on its claim as it is required to repay SLT if the Bank recovers from Bonded or Corum. *See Sunderland* v. *City of Philadelphia,* 575 F.2d 1089 (3d Cir. 1978). Finally, the cross-claims of Bonded and Corum are still very much alive and thus means for the determination of their ultimate liability in this matter are available to them.

Petitioners then filed an appeal to the Sixth Circuit Court of Appeals. During the appeal, Bonded and Corum moved the Court of Appeals for a stay pending final decision of a state case not involving First American which was pending in the Kentucky state court system. Bonded and Corum alternatively argued in their motion to the Court that the state case be certified to the Kentucky Supreme Court. The case involved an identical financing arrangement between SLT, Bonded, and another bank. Suit was filed by the bank against Bonded and SLT after the grain stored in another elevator was discovered missing. A loan receipt identical to that involved in this action had been entered into by SLT and the bank. In that case, the Kentucky Circuit Court also had denied Bonded's motion for relief from a summary judgment against Bonded, and that judgment of denial of relief as well as the summary judgment had been affirmed on appeal to the Court of Appeals for the Commonwealth of Kentucky.

The Circuit Court of Appeals denied Petitioners' motion for a stay but granted them the right to raise the certification issue on the appeal. Following briefing and argument, the Court thereafter entered an order affirming the District Court's denial of the Rule 60(b) motion. That affirmance did not, as Petitioners contend (p. 6) foreclose Petitioners from asserting their "jural rights" against SLT. The pending cross claims between Petitioners and SLT are set for trial in the District Court on August 29, 1983.

Petitioners thereafter filed a petition for rehearing based upon the Kentucky Supreme Court's decision to grant discretionary review in the companion case and asked, in the alternative, for certification of the question to the Kentucky Supreme Court. After requesting and receiving a reply brief from First American, the Court denied the petition. Petitioners then filed their petition for certiorari.

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners are challenging the Court of Appeals' decision in a diversity case affirming a denial of their motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Petitioners' sole claim is that the Court of Appeals departed from the accepted and usual course of proceedings in refusing to certify an alleged controlling state law question to the Kentucky Supreme Court and in incorrectly applying and interpreting Kentucky law.

The decision of the Court of Appeals is entirely consistent with the accepted and usual course of judicial proceedings for the following reasons:

(1) The Court of Appeals' affirmance of the District Court's denial of Petitioners' Rule 60(b) motion was a proper and sound exercise of the Court's discretion. The Court of Appeals chose not to abdicate its responsibility to decide a state law question presented to it for review and instead interpreted state law on a question which was far from novel or unsettled under Kentucky law. Indeed, there are abundant Kentucky cases supporting the validity of loan receipt transactions. The Court of Appeals' reliance on the decision of the District Court sitting in Kentucky and on the reasoning of the Kentucky Court of Appeals in a state case clearly is consistent with applicable Kentucky case law.

(2) The same conclusion applies to the Court of Appeals' decision not to certify the state law question to the Kentucky Supreme Court. In view of the Kentucky precedents and the status of the litigation, there were no novel or unsettled questions which the Court considered incapable of determining without certification. Certification only would have further prolonged this protracted litigation at additional delay and expense to Respondent. Exercise of the Court of Appeals' discretion in denying certification clearly was in accord with the accepted and usual course of judicial proceedings.

(3) Petitioners have failed to show any special and important reasons which warrant this Court's exercise of certiorari review. The issues raised by the Petitioners will have little, if any, effect upon anyone but the parties to this litigation.

REASONS FOR DENYING THE WRIT

The sole issue before this Court is whether the Court of Appeals' actions in affirming the District Court's denial of Petitioners' motion for relief from judgment based upon its interpretation of Kentucky state law constitutes a special and important reason for the Court's review of this case. Petitioners contend not only that the Court of Appeals abused its discretion by deciding the case without certifying a state law issue to the Kentucky Supreme Court, but that its interpretation of Kentucky law was fundamentally incorrect. Not only are these contentions insufficient to warrant this Court's review, but they are totally without merit.

A. The issues presented by Petitioners are not sufficiently special and important to warrant certiorari review.

This case is a simple collection suit on a note and a guaranty which have been reduced to final judgments. This Petition is but one in a long series of efforts to prolong this litigation and to avoid Petitioners' obligations to satisfy final judgments against them in excess of $2,500,000 entered by the District Court and affirmed by the Court of Appeals.

It is important to note that the cross claims pending in the District Court between Petitioners and SLT have been set for trial in the District Court on August 29, 1983. While a principal contention of Petitioners throughout this appeal has been that the loan receipt transaction somehow allows SLT to avoid Petitioners' defenses and cross claims and distorts the jural relations between the parties, the existence and trial of those cross claims moots this contention.

This Petition only involves a challenge to a Court of Appeals' interpretation of state law on a narrow issue involving loan receipts between a plaintiff and one co-defendant in a civil suit in Kentucky. It does not involve any issues "of national importance to the public as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice* v. *Sioux City Cemetery, Inc.* 349 U.S. 70, 74 (1954).

Petitioners' assertion that the Court of Appeals decision upholds the use of a loan receipt "where that use had been forbidden by prior decision of the Kentucky appellate court of last resort" (p. 19) is blatantly incorrect. The Court of Appeals' decision is not in conflict with any existing Kentucky decision and is in fact consistent with established judicial precedent in the state. What Petitioners challenge is the normal exercise of the Court of Appeals' discretion to decide and interpret state law. The Court of Appeals' decision in this regard is no different than thousands which have been rendered by the federal appellate courts. Clearly, the exercise of judgment by the Court of Appeals in this case is not of far-reaching or national importance. And consideration of the appellate court's decision only for the benefit of Petitioners is not sufficient to merit review by this Court. *Rice* v. *Sioux City Cemetery, Inc.* 349 U.S. 70, 74 (1955).

Nor does this case involve questions which impact upon the issue of uniformity between state and federal law. In this case, there is nothing to suggest that the Court of Appeals attempted to disregard established state law or insert its judgment for that of the Kentucky Supreme Court. The Court of Appeals entered a reasoned decision, after extensive briefing and argument, in accord with the reasoning of the District Court and Kentucky law. By no means was this a departure from the accepted and usual course of judicial proceedings. Nor is there anything to suggest that denial of this petition will undermine the principles of *Erie* or disrupt the administration of justice between the state and federal courts.

B. The Court of Appeals' decision is not in conflict with applicable Kentucky Supreme Court precedent.

Petitioners' contention that the Court of Appeals' decision affirming the denial of their motion for relief from judgment conflicts with the Kentucky Supreme Court decision in *Biven* v. *Charlie's Hobby Shop,* 500 S.W.2d 597 (Ky.Ct.App. 1973), is totally without merit. Loan receipts consistently have been upheld by the Kentucky courts beginning with the decision by the Kentucky Court of Appeals in *State Farm Mutual Auto Ins. Co.* v. *Hall,* 292 Ky. 22, 165 S.W.2d 838 (1949). *E.g.*, *Ratcliff* v. *Smith,* 298 S.W.2d 18 (Ky.Ct.App. 1957); *Aetna Freight Lines, Inc.* v. *R. C. Tway Co.,* 298 S.W.2d 293 (Ky.Ct.App. 1956). These cases all hold that loan receipts constituted valid loans rather than payments. In each case, the court looked to the intention of the parties to the transaction. If the parties intended it to be a loan, that intention is upheld by the Kentucky Courts.

The *Biven* case cited by Petitioners in support of their position is in fact consistent with this analysis. In *Biven,* however, the Court found as a matter of fact that the parties intended that the instrument be a release of the defendants rather than a loan, and it was noted that there was no contractual relationship between the parties to the loan receipt. The Court therefore held that the agreement between the plaintiff and the insurer of the defendants constituted a payment and a release. Unlike *Biven,* in the present case the parties clearly intended to make a loan, and there was in fact a contractual relationship between Respondent and SLT, the contract created by the warehouse receipts.

The Court of Appeals' decision upholding the loan receipt transaction is by no means inconsistent with Kentucky precedent or in conflict with *Biven.* By the terms of the loan receipt itself, Respondent must repay the loan out of its recovery against Petitioners. As a result, Respondent will not be receiving

a double recovery as urged by Petitioners (p. 20). Moreover, contrary to Petitioners' contention, the agreement is not champertous under Kentucky law. *Aetna Life Insurance Co.* v. *Weck*, 163 Ky. 37, 173 S.W. 317 (1915); *Wemhoff* v. *Rutherford*, 98 Ky. 91, 32 S.W. 288 (1895). And by dismissing SLT as a party to the lawsuit after judgment against Petitioners has been affirmed, none of the potential abuses condemned in the cases and articles cited by Petitioners (pages 25-27) could exist in this case.

C. **The Court of Appeals' interpretation of Kentucky law was consistent with its Erie obligations and did not depart from the accepted and usual course of judicial proceedings.**

The principal ground advanced by Petitioners for certiorari review is that the Court of Appeals interpreted Kentucky law in a manner inconsistent with its *Erie* obligations. This contention is without merit.

It is well-settled that interpretations of state law in diversity cases primarily are left to the Courts of Appeals and, through them, the District Courts. *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949). This Court consistently has expressed a general reluctance to "overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949); *Bishop* v. *Wood*, 426 U.S. 341, 346 n.10 (1976). Thus, in refusing to review a Court of Appeals' determination of state law, this Court said:

> In this Court the parties have argued the state-law question at great length....We decline to review the state-law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.

Butner v. *United States*, 440 U.S. 48, 57-58 (1979).

Similarly, the Court said in *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281 (1942):

> No decision of the Supreme Court of Michigan, or of any other court of that State construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan.

As in *MacGregor*, this Court is being asked to review an interpretation of Kentucky state law made by three Circuit Court of Appeals judges from the Circuit which includes Kentucky and by a Kentucky District Court judge of long experience.

Under *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), the Court of Appeals was obligated to apply the law of the state's highest court. It is an established principle, however, that:

> If the highest court has not spoken, the federal court must ascertain from all available data what the state law is and apply it. If the state appellate court announces a principle and relies upon it, that is a datum not to be disregarded by the federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *See West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 236-37, 61 S. Ct. 179, 183, 85 L.Ed. 139 (1940); *Ruth* v. *Bituminous Casualty Corp.*, 427 F.2d 290, 292 (6th Cir. 1970).

Clutter v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981).

It also is established that a court may give considerable deference to an opinion on the issue by an experienced District Court judge sitting in that state. *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 204 (1956); *Filley* v. *Kickoff Publishing Co.*, 454 F.2d 1288, 1291 (6th Cir. 1972).

The Court of Appeals' decision in this case was entirely in accord with these principles of *Erie*. The parties briefed and argued the relevant Kentucky decisions to the Court. As discussed more fully in part B, *supra*, the relevant Kentucky case law consistently has recognized the validity of loan receipt agreements. In reaching its decision, the Court of Appeals found the reasoning advanced by the District Court and the Kentucky Court of Appeals confronted with similar issues and the same case law to be particularly persuasive. This decision was entirely in accord with the Court's obligation under *Erie* and did not constitute an unreasonable interpretation of state law.

For this same reason, there is no basis whatsoever to Petitioners' assertion in Part B of their Petition (p. 16) that the Court of Appeals improperly relied upon the "non-final opinion" of the Kentucky Court of Appeals in reaching its decision. What is clear is that the Court of Appeals found the Kentucky court's reasoning a persuasive indicator in ascertaining state law, a ruling which it found to be in accord with the District Court's decision. Since the Court was obligated to ascertain and decide the state law question, its use of these sources in ascertaining and interpreting Kentucky law was not in error. Moreover, it should be noted that the identical argument was made by Petitioners to the Court of Appeals on appeal and on petition for rehearing. The Court's rejection of that argument demonstrates that the Kentucky Supreme Court's decision to grant discretionary review of the Kentucky Court of Appeals' decision did not alter its interpretation of Kentucky law.

D. The Court of Appeals' decision to decide a state law question rather than certify it to the Kentucky Supreme Court was not an abuse of discretion.

The reasons for denying further review of the Court of Appeals' decision interpreting state law apply with equal force with respect to Petitioners' argument that the state law question

should have been certified to the Kentucky Supreme Court. No basis exists in the applicable case law for overturning or altering the Court of Appeals' decision to exercise its obligation in a diversity case to decide the state law question before it for review. *Meredith* v. *City of Winter Haven,* 320 U.S. 228, 234-35 (1943).

In sanctioning the use of the certification procedure in *Lehman Brothers* v. *Schein,* 416 U.S. 386 (1974), this Court emphasized that the decision to certify a question to a state Supreme Court is discretionary with the appellate court. In this regard, this Court said:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. *Its use in a given case rests in the sound discretion of the federal court.*

Id. at 390-91 (emphasis added).

Similarly, the concurring opinion in *Lehman* stated:

> [I]n a purely diversity case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisrudence.
>
> . . . .
>
> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

Id. at 394-95 (Rehnquist, J., concurring).

In following the dictates of *Lehman Brothers,* the courts of appeal have refused to employ certification where they considered themselves capable of deciding the state law question. The undue delay and expense inherent in the process also has been cited as an additional reason for refusing to certify. *Florida ex rel. Shevin* v. *Exxon Corp.*, 526 F.2d 266 (5th Cir.) *cert. denied,* 429 U.S. 829 (1976). Thus, in *Marston* v. *Red River Levee & Drainage Dist.*, 632 F.2d 466, 468 n.3 (5th Cir. 1980), the Fifth Circuit refused to certify a question to the Louisiana Supreme Court based in part upon the following reasons:

> First, this cause is long in the tooth and should be disposed of if that can be done by us with confidence. Second, the law involved seems clear on its face, and we are relatively certain of its meaning.

Application of the same considerations provides additional support for the Court of Appeals' decision. The state law question regarding loan receipts was entirely clear. Since the first Kentucky decision in *State Farm Mutual Auto Insurance Co.* v. *Hall,* 292 Ky. 22, 165 S.W.2d 838 (1942), the Kentucky courts consistently have upheld the use of loan receipts. The Court also had the guidance of the Kentucky Court of Appeals' decision on an almost identical fact situation as well as the decision of the District Court. The case law in the area therefore was far from unsettled and more than sufficient precedent existed for the Court of Appeals to examine in making its decision. Nothing in the Court of Appeals' decision constituted a departure from those precedents.

The present case therefore is totally different from the decisions cited by Petitioners. *Lehman Brothers* involved judges in the Second Circuit ascertaining a novel, unsettled question of Florida law in reviewing a decision of a New York District Court. Thus, this Court said:

> Here resort to it [certification] would seem particularly appropriate in view of the novelty of the question and the

> great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

Id. at 391.

Here, circuit judges from the circuit which included Kentucky were reviewing a decision from a District Court judge sitting in the State of Kentucky on an issue which was far from novel or unsettled.

Unlike the present case, *Wecker* v. *Kilmer,* 471 F.2d 782, 783 (7th Cir. 1972), involved certification where there was "no clear controlling precedents" under the applicable Indiana law. Similarly, in *Maryland Casualty Company* v. *Hallatt,* 326 F.2d 275 (5th Cir.), *cert. denied,* 337 U.S. 932 (1964), there was no precedent in the applicable Florida law on the question in issue (295 F.2d 64), but before the litigation was terminated in the Federal Court, a Florida decision squarely ruled on the issue, and then the Fifth Circuit Court of Appeals granted a rehearing.

In this case, with ample Kentucky precedents, the Circuit Court had no reason for abdicating its obligation to decide the case before it. Its decision to decide the issue rather than certify the question was not an abuse of discretion, much less a substantial departure from the usual and accepted course of judicial proceedings.

CONCLUSION

For all the foregoing reasons, the Petition For Certiorari to the Sixth Circuit Court of Appeals should be denied.

Respectfully Submitted,

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